No. 83-271

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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and The University of Georgia Athletic Association, a Non-Profit Corporation, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Solicitor General agrees with us that the TV Plan and contracts have procompetitive effects that call for application of the Rule of Reason. The Rule of Reason inquiry envisaged by the Solicitor General is not, however, the traditional one, in which a court must inquire into all of the competitive benefits and detriments of the challenged conduct. He argues that a restraint "may be judged unreasonable without a full evaluation of its precise effects in the marketplace" (SG Br. 7; see also SG Br. 20).

The Solicitor General's argument that the judgment must be affirmed under the Rule of Reason depends on this Court's acceptance of his proposed new kind of antitrust scrutiny. (We do not understand the Government to argue that the lower courts carried out the detailed and careful assessment of all costs and benefits that application of the Rule of Reason

usually entails.) For the reasons that follow, we accept the Solicitor General's proposed new approach to antitrust scrutiny, but with an amendment: the "quick look" version of the Rule of Reason makes sense only if the defendant possesses market power. Otherwise there is a substantial risk that judges' cursory scrutiny of complex business practices will end in the condemnation of whatever is poorly understood. We elaborate this in Part I of this brief.

In Part II we reply to several arguments concerning the NCAA's market power. We show that only a finding of power over advertisers could establish the foundation for antitrust liability under the Rule of Reason. Neither the district court nor the court of appeals made such a finding. Finally, in Part III, we reply to respondents' boycott argument and address some of respondents' other contentions.

I. MARKET POWER IS AN ESSENTIAL INGREDIENT OF LIABILITY UNDER ANY REVISED VERSION OF THE RULE OF REASON

The Government's argument is straightforward. Some practices are so rarely procompetitive that courts properly condemn them whenever they appear. Naked cartel agreements are of this sort. Other practices are sometimes procompetitive, sometimes anticompetitive. The Rule of Reason applies to these practices. Yet a court often can conclude, after a cursory examination, that the practices in question lack procompetitive effects when employed as the defendants have employed them. The Solicitor General argues that a court may stop there and condemn the practices under the Rule of Reason, without the difficult, time-consuming, and costly inquiry that full-blown Rule of Reason scrutiny often entails. The Solicitor General concludes that the lower courts examined the NCAA's practices with sufficient care to reject them under such a standard.

We accept the Government's framework for analysis. Antitrust cases *are* excessively costly. It is highly desirable to

erect a series of presumptions and other shortcuts, based on reason and experience, that will enable courts to reach prompt judgments. We understand cases such as *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), to be based on principles of this sort. The creation of a form of Rule of Reason scrutiny based on well-grounded presumptions about what conduct is anti- (or pro-) competitive would make antitrust a better tool for examining complex business arrangements. It would decrease costs and increase predictability.

One presumption that would aid such an inquiry is that firms and associations without market power cannot injure competition. If the defendants' acts are procompetitive, they will be beneficial to consumers and the defendants alike. If the defendants' acts are not competitive, the defendants injure only themselves. Without market power, they cannot injure consumers. Antitrust inquiry should be at an end. Many courts of appeals so hold. See, e.g., *Sutliff, Inc. v. Donovan Cos.*, No. 83-1308 (7th Cir. Feb. 9, 1984); *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983); and the cases collected in Pet. Br. 34 n.19. See also *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

Antitrust is designed to assist consumers by maintaining the competitive conditions that lead to economic efficiency. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). The possession of market power—that is, power to raise price significantly above the competitive level without losing so much business that the raise is unprofitable—is the *sine qua non* of injury to consumers and the economy. Many cases reflect this. Mergers are an example: when firms' market shares are small, and hence there is no market power, they may merge without antitrust constraint. There are other examples as well.[1]

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[1] Showing market power is the first stage of tie-in analysis, as *Fortner II*, *supra*, holds. Proof of market power is indispensable in the consideration of inter- and intra-brand competition called for by

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This is not so say that firms that lack market power never commit injurious acts. They do. Firms may blunder in the pursuit of profits. They may make products people do not want, adopt practices that raise their own costs, or set prices too high for the market. These things create economic loss. When this happens, however, the firms bear most of the costs of their own conduct. They lose sales and profits. They suffer the discipline of competition. A court need not add to the penalty the competitive process imposes. Unless a defendant can *benefit itself by harming consumers*, the case should be dismissed without further ado.

This case is an example. Respondents say that the NCAA's TV Plan and contracts keep some attractive games off TV. The Plan denies viewers the opportunity to see some games they want to see, according to respondents. This tale is not plausible if the NCAA lacks market power. If the NCAA lacks market power, and the TV Plan removes attractive games from TV (without creating countervailing competitive benefits in the longer run), the NCAA suffers a reduced number of viewers without being able to charge a higher price per viewer. There are losses, but the NCAA suffers these losses automatically, by operation of the market, as viewers turn away. If the NCAA lacks market power, then, its choices in designing a TV package impose their own costs. The NCAA must change its Plan. Judicial interference would thwart, rather than further, this market process. (Of course, successful adherence to the Plan over an extended period supports the NCAA's principal

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Continental T.V., Inc. v. GTE Sylvania Inc., 432 U.S. 36 (1977), for without market power no vertical arrangement can imperil either kind of competition. The "dangerous probability of success" requirement in a proceeding under section 2 of the Sherman Act, 15 U.S.C. § 2, also reflects this Court's conclusion that the antitrust laws are not concerned with conduct that does not create or exercise market power. See *Swift & Co. v. United States*, 196 U.S. 375, 396, 402 (1905); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

argument: The Plan is procompetitive and helps the NCAA to compete for viewers against other entertainment.)

More generally, if the defendants in an antitrust case lack market power, then their acts must be (a) procompetitive; (b) competitively neutral; or (c) costly to themselves. There are no other options. Neither (a) or (b) is a ground for condemnation in antitrust. And although self-inflicted wounds (category c) have their costs, antitrust liability should not be among them. Markets are superior to courts in sifting the beneficial (category a) from the neutral and the deleterious (categories b and c). The beneficial practices survive in competition; other practices do not.

When a court tries to decide what is competitive and what is not, occasional errors are inevitable. (District courts often err on issues of pure law; the reversal rate exceeds 15 percent.[2] How much more common are errors on complex economic issues with which courts are unfamiliar? How many of these errors will elude appellate correction?) When the defendants have market power, the costs of these errors are tolerable parts of the price we pay for attacking monopoly. When the defendants lack market power, there is no reason to invite judicial inquiry and potential error.[3]

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[2] The average reversal rate of the federal appellate system is approximately 15.9%. Director, Admin. Office of the U.S. Courts, *Annual Report 1983*, at 220 (Table B-1). The reversal rate in private antitrust cases in 17.3%. *Id.* at 225.

[3] One court has made the point nicely in dismissing a Rule of Reason case even though it was not convinced that the defendant's arrangement was procompetitive or beneficial. Determining competitive benefit "would be beyond the intellectual power of this or any other court. Ultimately it is the market which will be the final arbiter of the efficiency, or lack thereof, of this [arrangement]. If [defendant] should persist in offering this [arrangement] and its competitors do not, the market will have the opportunity to choose between them. What we are dealing with are contracts made between and among consenting adults and corporations. Presumably then will act in such a way as to maximize their individual welfare, and it would be presumptuous and harmful if we were to substitute our ex post judgment for their ex ante choice." *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, 620 F.2d 1553, 1560 (11th Cir. 1983).

This Court therefore should reject the Solicitor General's invitation to bypass the market-power question and start with a quick look at the competitive effects of the TV Plan and contracts. The initial reference to market power for which we argue is a safeguard against error. Many business practices are poorly understood, even by the best economists. Knowledge follows rather than precedes the success of practices in the market. Even when people know why business practices work, the explanations may be hard to convey—especially in the setting of a trial, when the judge and jury lack economic training or business experience. The response "not persuaded" is natural when a judge is presented with a novel and difficult explanation of complex behavior. Again, this case offers an illustration. The NCAA's explanations for its conduct (Br. 15-27) try to show how rules that appear at first to be restrictive will have longer-run benefits in competition. The benefits are not precisely measurable; any claim of long-run competitive gains invites judicial skepticism and demands for "better"—perhaps unavailable—proof.

Who bears the risk of nonpersuasion? When a court is "not persuaded" by the defendant's explanation of conduct—as the lower courts were "not persuaded" by the NCAA's explanations of its TV Plan and contracts—who loses? If the defendant has no market power, the plaintiff should lose.[4] There is little potential gain in condemning poorly understood conduct when the defendant has no market power; there is substantial potential loss in condemning what we do not understand.

When the defendant lacks market power, judicial errors have biased effects; they always injure competition and consumers. An erroneous label of competitive practices as

[4] In addition to the materials on the burden of persuasion at Pet. Br. 27-33, see *Paschall v. Kansas City Star Co.*, 1984-1 Trade Cas. ¶ 65,841, at 67,517 (8th Cir. 1984) (en banc) ("the burden of proof is not on the defendant to prove the absence of anticompetitive effects. Rather, it is the plaintiff's responsibility to prove all the elements of the antitrust violation.").

anticompetitive leads to improper condemnation; a mistaken belief that destructive practices are beneficial does not make much difference because, in the absence of market power, "anticompetitive" practices injure the perpetrator and tend to disappear whether or not judges order relief. The approach we advocate reduces the costs of potential judicial errors without posing any risk to enforcement of the antitrust laws against those with market power who can benefit themselves by harming consumers.

II. THE NCAA LACKS MARKET POWER BECAUSE ADVERTISERS PAY ONLY FOR VIEWERS DELIVERED

Both the Solicitor General and the respondents urge this Court to defer to the findings of the lower courts on the market power issue. If these courts had found power using the appropriate legal principles, deference would be proper. But they did not use appropriate legal principles, and the two-court rule does not call for deference to findings made with the use of flawed legal principles.

The district court defined the market by asking what plaintiffs sold, *not* what consumers bought (Pet. App. 73a-74a). This is the only reason the district court gave for disregarding the NCAA's evidence about competition among program providers to sell viewers to advertisers. The district court's approach ignores the possibility of substitution. See our opening Br. 38-36. The Government does not (and cannot) defend this as a legally appropriate way to define market power.

The Tenth Circuit abandoned the district court's reason and found market power by observing that commercials on NCAA broadcasts sell for high prices (Pet. App. 18a-19a). This approach confuses an increase in output with market power. Prices of commercial time rise as more people watch; an increase in viewership is the objective of competition, not, as the court supposed, evidence of lack of competition. The court

did not say that the NCAA receives a higher price *per viewer* than other producers receive for similar demographic mixes. Only evidence of higher prices per viewer establishes market power. Thus the Tenth Circuit also used a legally inappropriate method of inferring power. As a result, deference to the lower courts' findings is unwarranted. The undisputed evidence, recounted at Pet. Br. 40-46, is that the NCAA has no way of inducing advertisers to part with extra payments per viewer by reducing the output of football games. The NCAA therefore lacks market power.

Of course we do not say that evidence of higher prices is essential to an inference of market power. Such power usually is established by logical rather than empirical arguments. It is quite appropriate to infer power by showing how the defendants *could* exploit their position. Yet no such analysis can be offered in this case. Solicitor General does not present any argument, logical or empirical, under which the NCAA can exercise control over the price of its product by reducing output. The Government presents two arguments on market power, but neither supports the lower courts.

The first argument (SG Br. 18-19) is that advertisers "in fact do pay more for the exclusive contracts than they would pay if schools could sell rights outside the package as well." This occurs, the Government maintains, because the "exclusivity feature of the package allows the chosen few networks to deliver larger audiences to advertisers . . ." This is just another way of observing that the TV Plan and contracts increase output and thus are procompetitive. The Solicitor General does not claim that the NCAA has any power to raise the price *per viewer*. No evidence would support such a position. Larger audiences do mean larger (total) payments, *but only because output is up*. This is the opposite of objectionable market power. The NCAA has no power to raise prices by decreasing output.[5]

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[5] The Government's inference of market power from increased revenues implies that a manufacturer of pins that improved the

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The Government's other argument (SG Br. 19) is that the restraints speak for themselves. "[I]f college football telecasts actually were an undifferentiated part of a large entertainment television market, there would be no need for the networks to seek an exclusive right to telecast the games.... The fact that networks seek, and obviously pay, to limit the amount of competition from other college football telecasts ... reflects their recognition that college football is indeed a distinct product ..."

This argument has several logical problems. First, it amounts to inferring market power—and thus condemning the TV Plan and contracts—on the basis of an integral part of the procompetitive feature of the contracts. The Government agrees (SG Br. 13-15) with our argument (Pet. Br. 20-27) that the TV Plan and contracts are potentially procompetitive. Part of the competitive benefit comes from the exclusivity. The exclusivity feature helps the networks promote the series, produce higher quality games, select games at the last minute, and so on. It is inappropriate to turn around and use the device that produces these benefits to condemn the arrangements.

Second, exclusivity is a ground for inferring that there is something special about college football only if exclusivity is itself unusual. But it is not. Almost every television series is exhibited under promises of exclusivity. "Dallas" is sold exclusively to a single network. When reruns of network shows are syndicated, the rights are sold exclusively to a single station in each city. The sale is not only exclusive of other stations but also designed to ensure that reruns are not broadcast at the same time as new episodes of the series. The same is true of the sale of motion pictures to television, and indeed of almost every sports presentation. These grants of exclusive exhibition rights facilitate promotion of the shows and ensure that audiences are not splintered, reducing the value of each exhibition.

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quality of its product and sold more pins, receiving larger total revenues, must have market power. In the absence of proof that the higher revenues were attributable to a reduction in output and a higher price per pin, the inference would be unsupportable.

When almost every TV show and series is sold under the contractual guarantee of exclusive exhibition, there is no basis for an inference that any particular seller (here the NCAA) has market power. Quite the contrary, when almost every seller, famous or obscure, large or small, uses the same kind of contractual device, the appropriate inference is that none has power and that the device is an appropriate method of competing in the particular market. The Department of Justice has recognized this in other forums.[6] The television programming

[6] The FCC is considering whether to permit the TV networks to acquire syndication rights to series made by independent producers. In the latest filing with the FCC, the Antitrust Division recounted: "The Department has argued consistently that the networks should be given control over syndication of programs that are in their network run. This will ensure that the networks are able to capture any efficiencies available from coordinating first-run and syndicated episodes of the same series. Such coordination would promote efficent use and promotion of the programs. . . . [The networks should be able to] restrict the time of day in which a program is broadcast, or the frequency with which it may be broadcast, during the network run. This . . . would allow the networks to capture any efficiencies resulting from coordination of new and syndicated episodes, thereby giving the networks an incentive to put programs into syndication most efficiently. . . . The most obvious restriction of this type is the right to exclusive exhibition of a program's episodes in prime time. It has long been standard industry practice for the networks to obtain such rights to assure that syndicated episodes do not 'free ride' on the network's prime time first-run exhibitions. Thus, at a minimum, the rule should [permit] the networks to obtain exclusivity in prime time during the network run." Comments of the Department of Justice, *In re Amendment of 47 C.F.R. § 73.658(j); the Syndication and Financial Interest Rule*, FCC BC Docket No. 82-345, filed Sept. 20, 1983, at 13-14.

These comments are significant for two reasons. First, the Antitrust Division depicts exclusivity as the ordinary state of affairs in broadcasting rather than as evidence of market power. Second, the Division explains how exclusivity may be procompetitive. Indeed, in an earlier filing in the same FCC proceeding, the Antitrust Division essentially adopted the argument we make in this case. It described how power over advertisers—*not* over viewers—is the fount of any

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market as a whole is competitive, with hundreds of program suppliers and thousands of advertisers competing.[7] There is accordingly no basis for an inference of market power here.

Respondents take a different approach to market power. They simply deny that it is appropriate to look to competition for viewers (Resp. Br. 37-38). They maintain that the television stations are the "direct" buyers, and that we have not cited "a single example from the annals of antitrust jurisprudence where a court or commentator has suggested disregarding the immediate buyers, in favor of ascertaining a seller's market power over the remote buyers of a product" (*id.* at 37). According to respondents, this Court should endorse the conclusion of the lower courts that college football has a special attraction to many viewers, and then stop.

Respondents themselves do what they say no court has ever done. They (and the lower courts) look at the supposed desires of the viewers (indirect demanders) in order to ascertain whether the NCAA has market power over TV networks (the direct buyers). We, too, want the Court to look at the demand of an indirect purchaser. We just want the Court to notice that the viewers, who respondents portray as the exploited buyers, *do not buy*. The people who pay for this product are advertisers. The NCAA has no power over these, the actual

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market power a network or program producer may possess. Comments of the Department of Justice dated January 26, 1983, at 37-39.

[7] In addition to the arguments at Pet. Br. 40-46, see, e.g., Woodbury, Besen & Fournier, *The Determinants of Network Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power*, 14 Bell J. Econ. 351 (1983) (careful empirical study finding that prices in the TV market depend on audience size, a clear indicator of effective competition); Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1982) (showing why courts should view sports leagues as joint ventures operating in large, competitive entertainment markets).

payors.[8] Viewers' preferences can not create the market power respondents suppose.

Courts define markets to measure power over price. Power over price arises, if at all, from the demands of the ultimate users of products. Thus if there is only one producer of Kryptonite, and the sole direct purchaser uses Kryptonite to make ashtrays, the producer has no market power if glass ashtrays made by other firms are equally acceptable to consumers. A court necessarily looks to the real buyers in order to determine market power.

Advertisers do not give two hoots about what programs summon viewers to their sets. They simply "buy audience", taking demographic characteristics of the audience into account. The data (see Pet. Br. 40-46) show that there are plenty of ways to assemble audiences with demographic qualities equal to or better than the NCAA's (which is why other programs sell for substantially higher payments per thousand viewers, see Pet. Br. 43 n.29). The data also show that the prices of all ads on all programs move together, and such joint price movement is "the single most useful guide to market definition". Areeda, *Market Definition and Horizontal Restraints,* 52 Antitrust L.J. 553, 566 (1983). The lower courts' inference of power is therefore unsupported.

Respondents err in asserting that "the annals of antitrust jurisprudence" contain no cases looking to indirect buyers to determine whether there is market power. Almost every

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[8] This fully distinguishes *International Boxing Club v. United States,* 358 U.S. 242 (1959), which defined a market of championship prize fights because championship fights are especially attractive to many people. The buyers in that case were those who attended the fights and watched movies or closed circuit TV. They paid directly. Those with special preferences could be exploited by a monopolist. There is no similar basis for inferring market power here. (The brief mention of broadcast television in *International Boxing* does not suggest that anything turned on this subject, and the Court never considered the possibility that in free TV the advertisers are the buyers. The parties had not made such an argument.)

merger case defines the market by looking to the ultimate consumer rather than the immediate buyers. For example, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), a merger of beer producers, the Court looked at shares of a market of beer consumers. It was irrelevant that multiple levels of intermediaries (wholesalers, retailers, jobbers, and others) lay between brewer and consumer, and that the brewer had no power over these wholesalers (who could switch to distributing cereal or ginger ale if beer became unattractive). See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (similar analysis of bleach). *United States v. Continental Can Co.*, 378 U.S. 441 (1964), defined a market of cans and bottles on the ground that many ultimate consumers found cans and bottles to be substitutes, even though most producers of containers (and most beverage manufacturers) used one or the other, but not both. Again, the preferences of the ultimate consumer were the dispositive consideration because they were the source of power. This list of similar cases could be extended.

Respondents also argue (Resp. Br. 36-37) that even if NCAA football is not a market, it is at least a "submarket." Here, too, respondents lose sight of the purpose of defining a market. Market definition is not an exercise in lexicographic legerdemain. It is, rather, a proxy for power to increase price by reducing output (see Pet. Br. 36-37, 45 n.32, collecting authorities). Reference to a "submarket" is appropriate only when the submarket indicates such power over price.[9] Whether NCAA football is a "market" or a "submarket" is immaterial, given our demonstration that the NCAA cannot drive up price by reducing its output.

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[9] See Areeda, *supra*, 53 Antitrust L.J. at 583-84 (emphasis added): "Antitrust law uses the relevant market concept only for the purpose of inferring the defendant's market power from his market share. To the extent this is possible at all, it depends on identifying the *one* product and geographic market that *best* gives the tribunal insight into the defendant's power . . . Accordingly, for each product and region, there can be only a single legally relevant market and not a multiplicity of legally relevant submarkets."

III. BECAUSE THE NCAA LACKS MARKET POWER, THE AGREEMENTS IN QUESTION MUST BE EITHER PROCOMPETITIVE OR NEUTRAL

The Solicitor General's argument that the per se rule does not govern this case (SG Br. 4-15) is compelling. The Rule of Reason applies, and we have shown above that market power is an essential ingredient in a case under the Rule of Reason. Thus even if this Court, like the Solicitor General, ultimately is not persuaded by the NCAA's arguments concerning the competitive virtues of the TV Plan and contracts, it should reverse the judgment.

A. The Plan is not Unlawful Per Se as a Boycott or as Monopolization

Respondents attempt to avoid this conclusion by arguing that the TV Plan and contracts are unlawful per se as monopolization (Resp. Br. 42) and as boycotts (Resp. Br. 16-17).

The monopolization argument adds nothing to the analysis under § 1 of the Sherman Act. Respondents offer no reason why conduct of this sort might be deemed unlawful under § 2 after it has passed the stricter scrutiny applied to agreements under § 1.

The boycott argument was adequately answered by the court of appeals (Pet. App. 22a-25a). Membership organizations are entitled to enforce their lawful rules. If the University of Oklahoma decides to field a professional football team, paying its players for services rendered, the NCAA, an organization of colleges running amateur programs, is entitled to penalize or expel Oklahoma. The NCAA may refuse to admit universities that do not adhere to specified academic standards. The Big Eight Conference may refuse to admit Harvard as a member.

The antitrust law does not prevent enforcement of rules that are not anticompetitive. If it did, antitrust would override the entire state law of voluntary organizations. The legality of a boycott accordingly depends on whether the underlying rule is anticompetitive. This Court implicitly recognized as much in

National Society of Professional Engineers, supra. The Society adopted a rule against competitive bidding, enforced by a boycott. This Court determined the legality of the practice by asking whether the rule (rather than the boycott) was anticompetitive. It should do the same here.[10]

B. The "Exclusivity" Features of the Plan are Procompetitive

If the NCAA lacks market power, it does not matter whether the lower courts' assessment of the NCAA's arguments concerning competitive benefits is correct. Nonetheless, we think it appropriate to respond to some of the Solicitor General's arguments on this subject (SG Br. 20-30).

The Government's repeated assertions that the lower courts rejected the NCAA's arguments on the facts[11] appear to reflect unfamiliarity with the record. Respondents are more accurate in stating what the court of appeals did. On some issues, the courts found "not enough evidence" (Resp. Br. 5) to support a conclusion; on others the district court's findings were "not overturned" (Resp. Br. 28) [but also not endorsed] by the court of appeals; still other factual disputes were "never reached" (Resp. Br. 32 n.39) by the Tenth Circuit in light of its placement of the burden on the NCAA.[12] See also Pet. Br. 17-

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[10] This is the path followed in the lower courts. In addition to the many cases cited at Pet. Br. 15 n.6 and SG Br. 14 n.16 that apply the Rule of Reason to "boycotts" by sports leagues, see, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, No. 81-2671 (7th Cir. Jan. 3, 1984) (en banc), slip op. 9: "[B]oycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price fixing agreements."

[11] E.g., SG Br. 27: "The courts below found that the NCAA package does not directly contribute to competitive parity, nor does it increase TV viewership."

[12] This is not to say that respondents are equally scrupulous about all factual issues. The assertion by respondents that the price of "exception" telecasts was "fixed" by the NCAA (Resp. Br. 15 n.8, 25 n.28) is simply untrue. See A. 67-69, 98-99 (current contracts give

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19, detailing the court of appeals' posture on disputed questions of fact. This Court therefore may not properly apply the two-court rule to the "findings" on the NCAA's contentions. The few things on which the lower courts agree are largely negative, such as that on some matters the NCAA did not carry a burden of showing the "necessity" of the arrangements or that there were "less restrictive" ways to achieve the benefits of the arrangements (e.g., Pet. App. 10a-15a). The courts simply did not find "no benefit."

The Solicitor General's principal submission on the question of competitive benefits is that the NCAA has not adequately explained why the TV Plan and contracts should give "exclusive" rights to the networks (e.g., SG Br. 20-22 & n.20). Here, too, there is a problem of description: the Plan does *not* create "exclusivity." Three networks (ABC, CBS, and Turner) possess rights to telecast games, and the "exceptions" rules allow the broadcast of as many games outside the network contracts as within their framework (A. 41-44, 244; Pet. Br. 3-4). We take it, though, that what troubles the Government is the rule that only one network game may be on the air at one time.

This form of "exclusivity" is no different from the exclusivity of any other network series. The producer of "Dynasty" will ensure that episodes do not air in conflict with one another. Such head-to-head airing simply splits the audience, reduces the incentives to produce good episodes (since each one will be worth less to a network), and makes it more difficult to promote the series as a competitor to other entertainments. If one station or network advertises, another may try to take a free

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(Footnote continued from preceding page)

complete freedom to colleges). Respondents' claim that the price per game under the network TV contracts was "fixed" by the NCAA (Resp. Br. 14) also is untrue; at least since 1979 the networks have established their own price per game without following the NCAA's recommendations (A. 522-24, 753-55; Tr. 1184-85). At all events, neither of these points would suggest any problem with the arrangements. If it is lawful to establish a total package price for a TV contract, it is also lawful to divide the proceeds. *Broadcast Music* establishes at least this much.

ride. This is directly analogous to the free riding problem in *Continental T.V., supra.* The Department of Justice's skepticism about these procompetitive effects with respect to football is at odds with the Department's proffer of almost identical justifications in arguing to the FCC that networks should be granted "exclusive" rights to TV series during their initial runs (see note 6, *supra*).

The kind of "exclusivity" about which the Government is concerned also is important in fostering long-run balance on the playing field, and thus in creating more exciting games and promoting competition against other entertainments on TV. "Exclusivity" makes it possible to limit each college's TV exposures; this spreading out of appearances has powerful effects on recruiting athletes, enhances attendance in the stadiums and rivalry over the field (Pet. Br. 20-22). It is important (even "necessary") for the NCAA to enforce appearance limitations by entering into exclusive broadcasting arrangements.[13]

The Government suggests that the "balance" benefits could be achieved under contracts drafted by the networks. It implies that each network could line up a stable of teams, and that if appearance limits assist in competition over the longer run, the networks will impose these limits without the need for limits by the NCAA. But such a plan is vulnerable to holdouts. Suppose ABC and CBS sign up 50 teams apiece and limit the annual number of telecasts per team in order to assure long-run balance. (We put to one side the question what happens when an "ABC team" plays a "CBS team.") This creates new incentives for NBC and the remaining teams. These teams would hold out and broadcast "spot" games on NBC. These holdouts would obtain additional exposure and improve their recruiting and receipts at the expense of adherents to the other networks' contracts.

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[13] See also J. Markham & P. Teplitz, *Baseball Economics and Public Policy* (1981) (advancing for baseball many of the same efficiency arguments we offer for the football arrangements).

This would spoil the plan, and other teams would be induced to drop out rather than fall behind. ABC and CBS could not pay enough to bring all into the fold. Like the owners of the last parcel of real estate needed to complete a plot for a large development, the holdouts could insist on receiving a disproportionate share of the returns. Because each school is a potential holdout and can demand disproportionate returns, yet the networks cannot pay the teams (collectively) more than the total benefits of the package, holdouts could undercut the arrangements. Only the NCAA, to which all major football institutions belong, can get around the holdout problem.

C. Basketball Arrangements do not Undercut the Arguments for the Benefits of the Football Plan

Both respondents (Br. 29) and the Solicitor General (Br. 22) join the district court (Pet. App. 47a-48a, 76a) in arguing that the difference between the arrangements for college basketball telecasting and those for football undercuts the NCAA's arguments. If the NCAA's points about competitive benefits are true, they ask, why is basketball not covered by exclusive contracts? Of course, we might turn the question around: If restrictions on TV coverage exploit market power to create monopoly profits, how come the NCAA has missed the boat on basketball? The difference between the television arrangements for football and those for basketball is therefore more ambiguous than first appears. And we think there are good explanations for the difference. See A. 639-41.

First, colleges can mount successful, competitive basketball programs at lower cost than in football. The pool of superior high school talent in basketball is very large, and the costs of maintaining a 12 to 15 player squad is much less than the cost of maintaining a 100 player squad in football. The costs of recruiting and supporting players are lower. There is accordingly less need of a program of television controls designed to influence recruiting or other elements of rivalry.

Second, basketball viewership tends to be more regional. Local teams attract more attention than teams from far away.

Reflecting this fact, the regional athletic conferences often implement their own basketball programs. The Big Eight Conference has done so (see Pet. Br. 35; Tr. 210-21). This program establishes a "Big Eight Game of the Week" with exclusive telecasting rights. It supplies many of the benefits of the NCAA promotion of football.

Third, each college basketball team plays approximately 30 games per year, compared to 11 for football. There are basketball games every evening and both afternoons and evenings on weekends. The increase in the number of matches available for telecast also makes it easier for broadcasters to find "competitive" games without resorting to mechanisms that affect recruiting opportunities. The proliferation of basketball games (and game times) makes it easier for multiple schools to obtain TV exposure and the concomitant recruiting benefits. It also makes it easy for colleges to schedule their home games so that they do not conflict with TV broadcasts that might affect attendance. Things are not so easy for football, because 95% of all college games are played on Saturday afternoon, the time best suited for attracting alumni and fans from out of town.

Fourth, basketball arenas are smaller than football stadiums. Most of the fans are students. It is easier for colleges to fill their arenas despite competition from TV; they need not attract alumni from out of town. Fans may watch TV one evening and attend a game the next. DePaul students and alumni will not stay home to watch UCLA play Notre Dame on TV. Because of these differences between basketball and football, the Court should not draw the inference respondents and the Solicitor General urge.

D. Topco Does Not Support Respondents

Respondents contend (Br. 26-27) that many of the NCAA's arguments are inconsistent with *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). Respondents say that *Topco* rejects efforts to justify diminution of competition in one sector of the economy by an increase in competition in another, and they portray the NCAA's arguments as such forbidden efforts because they justify a reduction in output of one product (college football on TV) by an increase in output of another.

We think that respondents misunderstand our points. We have not argued, in the Court's words, that "destruction of competition in one sector of the economy [may be balanced against] promotion of competition in another sector" (405 U.S. at 609-10). Only one "sector of the economy" is at issue here. That "sector" is entertainment. Live and televised football games are elements of that sector. The TV Plan and contracts do not "destroy competition" in this or any other sector or market. Like the internal arrangements of General Motors or any other firm, the arrangements challenged here are cooperation that promotes competition in the only sector at issue. They expand output. There is no reduction in one place to compare against an increase elsewhere. *Topco* is irrelevant.

We return to where we began. The NCAA's TV Plan has potential competitive benefits, so the Rule of Reason applies. Under the Rule of Reason the NCAA must prevail, if for no other reason than that it lacks market power. It cannot increase its profits by reducing its output of games.

If plaintiffs are right, and the TV Plan denies viewers the games they most want to see, then the NCAA pays a penalty in lower revenues. It cannot make itself or its members better off by frustrating viewers' desires. There is no need of antitrust to protect the NCAA's members against misjudging their customers' (and their own) best interests.

If we are right, on the other hand, the TV Plan and contracts are output-increasing methods of competing against other entertainment. They promote rivalry on the field and thus attract viewers; they facilitate last-minute selections of exciting games, top-quality professional productions by broadcasters; they increase live attendance. There is no warrant for antitrust to put a stop to such beneficial practices.

So whatever the Court thinks about the competitive merits of the TV Plan and contracts, an antitrust remedy is unjustified. The NCAA will continue to respond to market forces in an effort to produce the quality college football people want to watch.

CONCLUSION

For these reasons, as well as those set out in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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